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IN THE

Supreme Court of the United States

October Term, 1969

No. 1469

TIME, INC.,

Petitioner,

v.

JACK WASSERMAN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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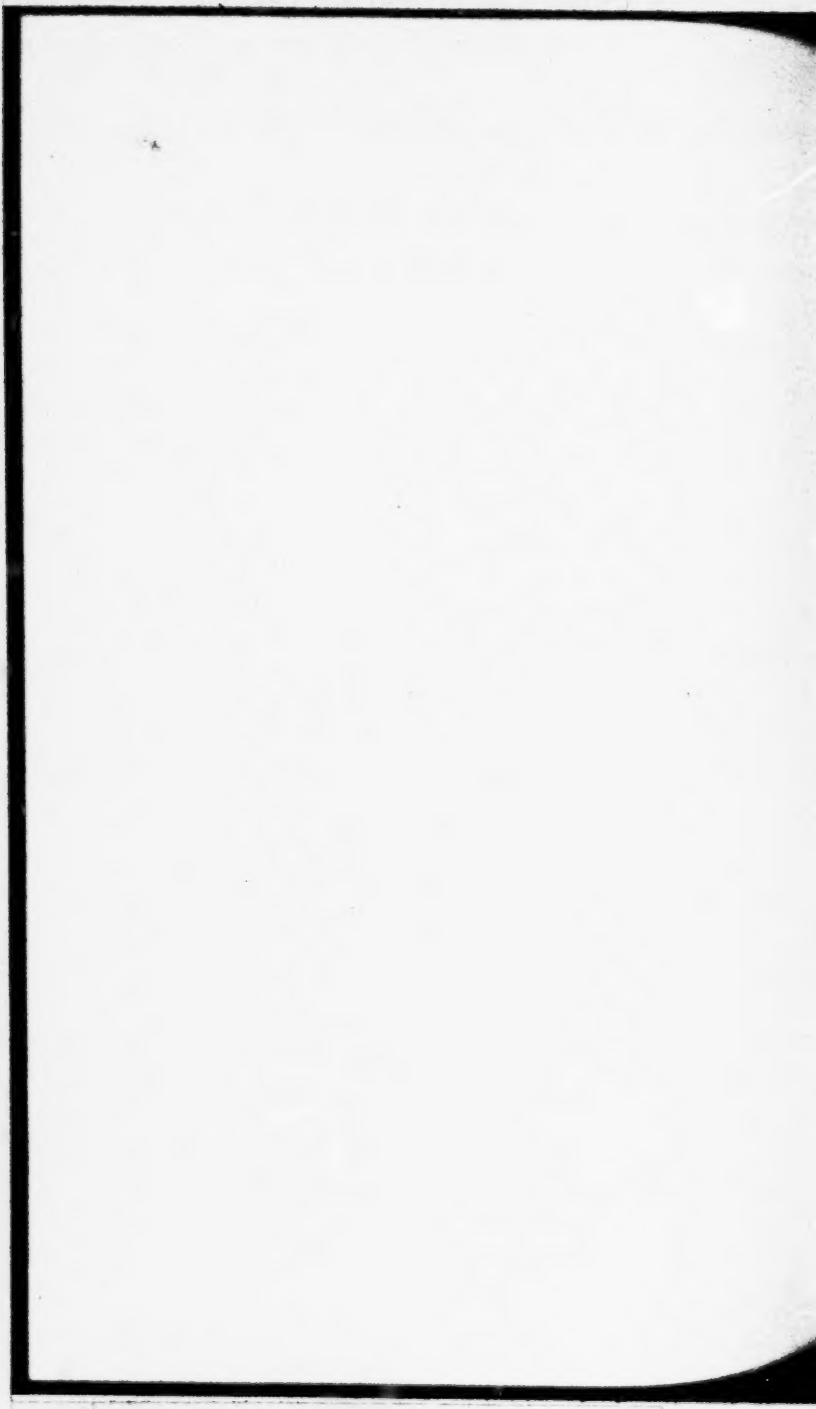

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner seeks a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit from the judgment of that Court, reversing an order of the United States District Court for the District of Columbia, which granted petitioner's motion for summary judgment.

OPINION AND ORDERS BELOW

The order of the District Court granting summary judgment is attached hereto as Appendix A. No opinion was rendered by the District Court. The opinion and judgment of the Court of Appeals for the District of Columbia Cir-

cuit reversing the District Court's judgment has not been officially reported but is attached hereto as Appendix B.

JURISDICTION

The judgment of the Court of Appeals reversing the District Court's order granting summary judgment was entered March 3, 1970. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. Does the deliberate and good faith omission of a known fact which the publisher believed, and still believes, to be irrelevant constitute knowledge of falsity or serious doubts as to truth within the meaning of *New York Times* v. *Sullivan*, 376 U. S. 254 (1964)?

2. Was the District Court correct in granting summary judgment to defendant and dismissing this action where the uncontradicted evidence showed that:

(a) the article in question dealt with public figures and matters of public interest; and

(b) the article was published following a complete factual investigation in the good faith belief that it was true?

3. Can the Court of Appeals substitute its own editorial judgment for that of responsible journalists?

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the First and Fourteenth Amendments, United States Constitution, Amendment I, Amendment XIV, § 1.

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"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U. S. Const., amend. I.

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U. S. Const., amend. XIV, § 1.

STATEMENT

Introduction

This is a "deliberate omission" libel case in which the respondent, Wasserman, complains of the decision of petitioner, reached in good faith, not to identify Wasserman as an attorney when picturing him with his mobster clients in a photograph accompanying an article dealing with the activities of those mobsters.

The article, published in Time Magazine for October 7, 1966, is reproduced in Appendix C. It described the arrest of 13 Cosa Nostra leaders at the La Stella Restaurant in Queens; their refusal to testify before a Queens County Grand Jury; and a second luncheon at La Stella at which the participants (representing and playing the part of the 13 originally arrested) demonstrated their contempt and disdain for law enforcement. Wasserman was

not mentioned in the article, nor was Frank Ragano, another attorney. Accompanying the article was a photograph of the second luncheon in which Wasserman and Ragano were pictured with their clients but were not identified either by name or as attorneys.

Wasserman then brought the instant action. After the depositions of Wasserman and of petitioner's employees who wrote, checked and edited the article had been taken, petitioner moved for summary judgment on the basis of those depositions and accompanying exhibits.* Wasserman filed a cross motion. After hearing, the District Court (Robinson, J.) without opinion entered an order on May 29, 1969, granting summary judgment to petitioner and denying Wasserman's cross motion. On March 3, 1970, the Court of Appeals reversed and ordered a trial of all issues.

Ragano's Companion Action

The other attorney pictured in the photograph accompanying the article, Frank Ragano, also sued for libel, but in the Middle District of Florida. In that case it was stipulated that the depositions taken in the instant *Wasserman* case should be admitted for all purposes, and Ragano's deposition was also taken. On the basis of those depositions petitioner moved for summary judgment against Ragano. That motion was denied, without opinion, by Chief Judge Lieb on December 18, 1968, and a motion for reconsideration was likewise denied by him, without opinion, on January 27, 1969.

---

*In this petition the deposition of Wasserman is referred to as "W. Dep.", the depositions of petitioner's employees are referred to as "T. Deps.", and the appendix printed below which is included in the record certified to this Court is referred to as "App.". The exhibits to the depositions are included in the original record below which has also been transmitted to this Court.

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After Judge Robinson granted petitioner's motion for summary judgment in the instant case, petitioner renewed its motion for summary judgment in the *Ragano* case. That motion was denied by Judge Krentzman on August 8, 1969, with an opinion (302 F. Supp. 1005). Judge Krentzman, however, recognized that there were "substantial grounds for difference of opinion" and certified the case for interlocutory appeal pursuant to 28 U. S. C. § 1292(b). Leave to appeal was granted by the United States Court of Appeals for the Fifth Circuit. The *Ragano* case is now pending in that Court, having been argued on April 8, 1970.

Relevant Facts

The uncontradicted facts of this case, on which petitioner relies for summary judgment, can be most readily reviewed in the perspective of respondent's background, the original arrest, the second La Stella luncheon and petitioner's editorial process.

(a) Respondent.

The respondent, Jack Wasserman, is an attorney practicing in the District of Columbia; Carlos Marcello is his client (W. Dep., App. 183). Marcello has long had the reputation of a leading hoodlum and the Mafia or Cosa Nostra leader in New Orleans.* Wasserman first repre-

*For example, in 1961, the New York Times called Marcello the "alleged rackets king in New Orleans" (W. Dep., App. 193, ex. 6), and the Washington Post has called Marcello "one of the leaders of the Mafia" (W. Dep., App. 194, ex. 7). Both Senators Kefauver and McClellan have denounced Marcello for his criminal activities (W. Dep., App. 187, 191), and United States District Judge Ben Dawkins has called Marcello "a racketeer of the first order who deserves little sympathy from anybody" (W. Dep., App. 199-201, ex. 13-14).

sented Marcello in 1955 in litigation in this Court concerning Marcello's immigration status (W. Dep., App. 183). Since 1955, he has become more and more closely associated with Marcello and he is now widely referred to as Marcello's "chief attorney", a description Wasserman does not dispute (W. Dep., App. 205).

(b) The La Stella arrest of September 22, 1966.

On September 22, 1966, the New York City Police Department raided a meeting and arrested 13 men at the La Stella Restaurant in Queens, New York. The Chief Inspector of the New York City Police Department reported that the 13 men were "Mafia leaders" and that the meeting was "a little Apalachin" (W. Dep., exs. 97-104). Carlos Marcello attended the meeting. Marcello and the other men arrested were held as material witnesses and called to testify before a special Grand Jury in Queens County (W. Dep., exs. 105-126). The incident was widely publicized in the press, as appears from the exhibits cited.

Marcello called his "chief attorney", Jack Wasserman. Wasserman advised Marcello and other clients of their constitutional rights. When they first appeared before the Grand Jury they invoked the First, Fourth, Fifth, Eighth, and Fourteenth Amendments in declining to testify, although subsequently they did testify (W. Dep., App. 245-46, 248).

(c) The La Stella luncheon of September 30, 1966.

On September 30, 1966, during a noon break in the Grand Jury proceedings, Wasserman, accompanied by his clients, including Carlos Marcello, and another attorney, Frank Ragano, accompanied by his client, Santo Traffi-

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cante,* deliberately and openly and with clear invitation to newspaper reporters, repeated the luncheon at La Stella in what the daily press appropriately interpreted to be a staged performance and an obvious gesture at law enforcement agencies to show that law enforcement could not touch that criminal element.

The incident received front-page publicity in the New York papers (W. Dep., exs. 131-133, 135, 136). The New York Times, on October 1, 1966, concluded that the luncheon was *"to show their disdain for the proceedings"* (T. Deps., ex. 2, App. 175-7). The New York Daily News, on the same date, commented on *"the general gaiety that pervaded the restaurant"*, and observed that the *"move [was] obviously staged"* and *"seeemed to be rehearsed"* (T. Deps., ex. 2, App. 172-4). Both newspapers quoted participants in the luncheon as saying *"Why don't they arrest us . . .?"*

On the day following the luncheon, Wasserman expressed his appreciation to the reporters for their coverage of the incident.

> "Q. Didn't you and Ragano say to the reporters, 'Thank you very much'?
>
> "A. I may well have told the reporters that I considered the news report accurately worded, or something like that, yes.
>
> "Q. And didn't you and Mr. Ragano tell Greene and Kessler that the stories were great and the reporters had kept their word?
>
> "A. I don't recall anything about saying keeping their word, but it may have been said.

*Trafficante has long been reputed as the Cosa Nostra leader in Miami. In his deposition in his case Ragano stated that he had been a social friend of and attorney for Trafficante since 1958, that Trafficante was a reputed Cosa Nostra or Mafia leader, that Trafficante had atttended the notorious Apalachin meeting, and that Trafficante has been under constant surveillance by the FBI.

"I mean, I cannot recall the specific language that was utilized on October 1 in an offhand conversation with newspaper reporters the following day.

"Q. But the substance of what I have stated is accurate insofar as you can recall?

"A. I have no basis for denying the accuracy of what you state." (W. Dep., App. 270)

(d) Petitioner's editorial process with respect to the publication.

The publication upon which this suit is based was researched and checked for accuracy in its final form by Researcher Serena Rachels, written by Writer Timothy James, edited by Editor George Daniels, and, after complaint and demand for retraction was received, reviewed by Editorial Counsel John Dowd and Managing Editor Otto Fuerbringer. As previously stated, the depositions of James, Daniels, Rachels, and Dowd were taken in this case. These depositions clearly describe the editorial process followed by petitioner in connection with the challenged publication.

The newspaper articles describing the September 30 luncheon appeared in the morning papers of Saturday, October 1. Researcher Rachels was asked to compile a file from which a story concerning the incident might be written (T. Deps., App. 53). She collected a file of newspaper coverage of the original La Stella luncheon, at which the 13 Costa Nostra leaders were arrested, and of the September 30 luncheon (T. Deps., App. 55). The coverage of the first luncheon went into detail respecting the notorious criminal careers of the 13 leaders present. The stories in the New York Times and the Daily News of October 1 were remarkably similar in their description of the second luncheon. This editorial file has been produced, and appears at App. 167-178. In her capacity as researcher, Miss Rachels

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also reviewed the biographical data in the Time files concerning the 13 hoodlums who attended the first luncheon (T. Deps., App. 53-4).

Mr. James read the file before writing the article and Mr. Daniels read the file before editing it (T. Deps., App. 89, 114). When the article was in final form it was sent to Miss Rachels for a review of its accuracy (T. Deps., App. 57).

When a letter dated October 6, 1963, was received from Wasserman complaining about the article, the file was reviewed by Editorial Counsel Dowd and by Managing Editor Fuerbringer (T. Deps., App. 143, 144-7). Copies of the resulting correspondence between Wasserman and petitioner appear at App. 10-13.

James, Daniels, and Rachels testified unequivocally as to their belief in the truth of the article at the time it was published (T. Deps., App. 69, 101, 125). They also testified that they believed that the file compiled by Miss Rachels was a sufficient basis upon which to write the article (T. Deps., App. 68, 94-5, 120). During the deposition Daniels was asked the basis of his belief. His answer was unequivocal:

> "Q. I take it you did no investigation of the facts independently.
>
> "A. No. It seemed clear enough to me."
>
> * * *
>
> "Q. Do you consider the New York Daily News a good factual source of information?
>
> "A. Yes, I do. They are generally quite good on things like that. So is the New York Times. *The information is virtually identical in the two stories.*"
>
> (T. Deps., App. 119-20, 131) (Emphasis supplied.)

Dowd also testified to his and Fuerbringer's belief in the truth of the article at the time it was reviewed (T. Deps.,

App. 147, 159). All who testified stated that they construed the purpose of the second La Stella luncheon as a publicity stunt; that, in their opinion, the second luncheon was intended as a re-creation of the first luncheon and its purpose was to show defiance of law enforcement authorities; and that Wasserman participated in the re-creation in a representative capacity as one of the original 13 Cosa Nostra leaders, whom those attending the second luncheon obviously were portraying (T. Deps., App. 72-4, 79, 99, 107, 122, 127-8, 144-7).

There is no dispute that all concerned knew Wasserman was an attorney (T. Deps., App. 66-7, 92, 120, 141).

The testimony is uncontradicted, however, that all concerned likewise believed that Wasserman was not acting as an attorney when he participated in the luncheon (T. Deps., App. 79, 99, 122, 146). He was, rather, playing the part of one of the arrested Cosa Nostra leaders. That was the basis of the editorial decision, challenged in this case, that no reference be made to Wasserman's status as an attorney. The decision is best exemplified by the testimony of Editor Daniels, as follows:

> "Q. And there are seven people there?
>
> "A. I am afraid that Mr. Wasserman and Mr. Ragano there are representing the entire group.
>
> "Q. Is it your belief that by representing the entire group they become members of the Cosa Nostra?
>
> "A. Journalistically speaking, it's the same thing, I believe.
>
> "Q. And is that the reason why you did not identify Mr. Wasserman as an attorney?
>
> "A. There was no need to, in my judgment.
>
> "Q. Because, as you stated, journalistically speaking, they were all Cosa Nostra members?

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"A. Journalistically speaking, they all went to this for one simple purpose, which was to gain publicity, in my judgment, and to defy the law.

"Q. And that is the reason why you did not identify Mr. Wasserman as an attorney?

"A. That is correct.

"Q. Because, in your judgment, they were there to gain publicity?

"A. And to defy the law. Correct." (T. Deps., App. 127-8)

REASONS FOR GRANTING THE WRIT

This case presents an important question of First Amendment rights—the right of a publisher to constitutional protection for deliberate decisions to omit facts because in the publisher's good faith judgment such facts are irrelevant or would give a false impression—which was decided below in conflict with the holdings of this Court in *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), and subsequent cases.

1. The importance of the "deliberate omission" issue.

Application throughout the country of the new constitutional doctrines stemming from *New York Times* has proceeded smoothly on the whole. Those doctrines include: putting the constitutional burden upon a libel plaintiff to prove "with convincing clarity" "actual knowledge of falsity" or "serious doubts as to truth", applying that test to articles dealing with subject matters of public interest, and granting summary judgment to a responsible journalist who reveals his good faith editorial process to the Court

(see discussion, *infra*). For the most part those cases, however, have dealt with affirmative statements of fact or opinion. More difficulty has been encountered in application of those principles in cases where there has been a bona fide editorial decision of omission—for convenience, we shall call those cases the "deliberate omission" cases. In those cases some courts have tended to substitute their own editorial judgment for that of a responsible journalist, in direct contravention of a basic tenet of the First Amendment.

There are three of those cases now in the Federal courts and involving petitioner Time, Inc. In the first, *Pape* v. *Time,* the United States District Court for the Northern District of Illinois (Robson, J.) dismissed the action at the close of a trial [294 F. Supp. 1087 (1969)] but the Seventh Circuit reversed and stated that a jury issue had been created [419 F. 2d 980 (1969)]. A petition for certiorari is presently pending in this Court, No. 1309. The second is the instant *Wasserman* case. The third is the companion *Ragano* case, now pending before the Fifth Circuit. In these three cases, two district courts have upheld petitioner's right to constitutional protection, and two Courts of Appeal and one district court have denied it. The questions involved are important, novel and in need of authoritative resolution by this Court. If the decision below is allowed to stand, publishers face the "chilling effect" of trial if they decide to omit a fact, and the courts of the United States are free to impose their journalistic judgment upon good faith decisions of the press, contrary to the teaching of *New York Times* that constitutional protection can be lost only where it can be convincingly shown that the press acted with "actual malice".

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2. The failure to follow *New York Times*.

All courts passing upon these "deliberate omission" cases accept the general doctrine laid down in *New York Times* and subsequent cases that (1) the Constitution applies since matters of public interest are involved,* (2) a plaintiff must show "with convincing clarity" either "actual knowledge of falsity" or "serious doubts as to truth",** and (3) summary judgment is a necessary constitutional corollary to the *New York Times* doctrine.***

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*See, *e.g.*, *New York Times* v. *Sullivan*, 376 U. S. 254 (1964); *Garrison* v. *Louisiana*, 379 U. S. 64 (1964); *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966); *Curtis Publishing Co.* v. *Butts and Associated Press* v. *Walker*, 388 U. S. 130 (1967); *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967); *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc., et al.*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969); *Time, Inc.* v. *McLaney*, 406 F. 2d 565 (5th Cir. 1969), *cert. denied*, 395 U. S. 922 (1969); *Rosenbloom* v. *Metromedia*, 415 F. 2d 892 (3d Cir. 1969), *cert. granted*, 38 U. S. L. W. 3309 (U. S. Feb. 24, 1970); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, F. 2d (3d Cir. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969). A discussion of the "public interest" doctrine is attached as Appendix D.

***New York Times, supra; Garrison, supra; Beckley Newspaper Corp.* v. *Hanks*, 389 U. S. 81 (1967); *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). A discussion of the "actual malice" doctrine is attached as Appendix E.

***See, *e.g.*, *Washington Post* v. *Keogh*, 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967); *United Medical Laboratories, supra; McLaney, supra; Thompson* v. *Evening Star*, 394 F. 2d 774 (D. C. Cir. 1968) *cert. denied*, 393 U. S. 884 (1968); *Walker* v. *Pulitzer Publishing Company*, 394 F. 2d 800 (8th Cir. 1968); *Hurley* v. *Northwest Publications*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Klahr* v. *Winterble*, 4 Ariz. App. 158, 418 P. 2d 404 (1966); *Ryan* v. *Dionne*, 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *New-Journal Co.* v. *Gallagher*, 233 A. 2d 166 (Del. 1967); *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Hawaii 1968), *cert. denied*, 396 U. S. 822 (1969); *Bon Air, supra; Sellers, supra; Cerrito, supra.* A discussion of the summary judgment doctrine is attached as Appendix F.

The error below and the limited question presented upon this petition is the failure to apply those principles to a good faith editorial decision of omission where the publisher in good faith believes that the omission of the irrelevant fact enabled it to publish the truth. Put simply, can the omission of matter which a publisher honestly believes is irrelevant or misleading constitute "actual malice" under the *New York Times* rule? To state the question impels the answer, for otherwise the courts are substituting their editorial judgment for that of the press, contrary to the very essence of the First Amendment—yet that is all that is involved in this case.

The Circuit Court's erroneous decision on the simple question stated above was based on three misconceptions, each fundamentally opposed to the *New York Times* rule. First, it erroneously held that a knowledgeable editorial decision of omission includes, by the very fact of knowledge of the decision (which any responsible journalist will always have), knowledge of falsity. Second, it erroneously held that a court is free to substitute its own editorial decision for that of the publisher in making a judgment as to truth or falsity. Third, it isolated and focused entirely upon one single factor, the good faith omission, to find "actual malice", to the complete exclusion and disregard of all other evidence concerning the editorial procedure and methodology followed in preparation of the article and the uncontradicted beliefs of the editor, writer and researcher that it was true. All three conceptions are erroneous*:

(a) Knowledge of falsity by reason of knowledge of omission.

The Circuit Court totally misapprehended the test which it was required to apply in judging whether the publication

*The identical errors were indulged in by the Seventh Circuit in the *Pape* case and the District Court in the *Ragano* case, errors which were rejected by the District Court in the *Pape* case and the District Court in this case.

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was entitled to constitutional protection. Thus, in *New York Times* this Court explicity stated: "A defense for erroneous statements honestly made is no less essential here" (376 U. S. at 278) and barred action on such statements "believed to be true" (p. 279). Again, in *Garrison,* this Court stated that: "Utterances honestly believed contribute to the free interchange of ideas and the ascertainment of truth" (379 U. S. at 73). The same protection necessarily extends to deliberate omissions honestly made in the belief they were necessary to the truth. Such omissions cannot constitute the "actual malice" which is required to defeat the constitutional protection.

But the court below completely disregarded these principles in reaching its conclusion that there was a basis for denial of constitutional protection; its conclusion was based solely upon the following statement:

> "However, as more fully appears in the opinion of Judge Krentzman, it is undisputed that Time knew that Wasserman, like Ragano, was an attorney for one or more of the men in the group referred to in the article and was not one of those called before the grand jury and released on $100,000 bail."*

All the court is saying is that the editor, writer and researcher knew that they were omitting a fact. This does not cover the further, and essential point that, in the view of the editor, writer and researcher (as testified to on depositions) the omission of that fact made the story true. The essential inquiry is not whether the editor, writer and re-

*Similarly, in the *Pape* case, now pending in this Court as No. 1309, the Seventh Circuit based its conclusion solely upon the following statement:

> "However, Magnuson deliberately and knowingly failed to mention in the article that his story of the alleged conduct and action of Pape and the other police officers was based on an allegation in a complaint in a pending civil suit."

searcher knew what they were doing—rather, it is whether the editor, writer and researcher, knowing what they were doing, "honestly believed" in the truth of that which was said. But the court below failed to make this inquiry. Instead, it engaged in a complete *non sequitur*—since petitioner knew that Wasserman was an attorney and had not been arrested, petitioner knew that the article was false—which ignores the nature of the editorial process, the subjective nature of the "actual malice" standard of *New York Times,* the facts which amply supported the honest belief of petitioner's employees that they were publishing the truth, and the lack of any contrary showing that they had actual knowledge of falsity.

The fact that an editorial decision to omit material is knowingly made cannot mean *ipso facto* that the resulting publication is known by the publisher who makes that decision to be false. By the nature of the editorial process, the publisher, confronted with a mass of facts concerning a person, must pick and choose among those facts in order to present a story which, in his opinion, most accurately informs the reader about the matter of public interest in which the person was involved.

In looking solely to the fact that Time knew Wasserman and Ragano to be attorneys, the court below also ignored the subjective nature of the "actual malice" standard. If actual malice means actual serious doubts as to truth, as this Court has held, then it is only the state of mind of petitioner's responsible employees which is relevant. It is not enough to say that those employees had actual knowledge that Wasserman was an attorney. Neither is it enough to show that they had actual knowledge that he was not one of those who had been arrested at the first luncheon. It is necessary in addition to show that they published something which, in light of those facts, they knew to be false.

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Such a showing is precluded by the facts of this case. They amply support the honest belief of petitioner's employees that Wasserman should not have been identified as an attorney. They show that seven persons, including Wasserman, who participated in the second La Stella luncheon were showing their contempt for law enforcement authority by acting the part of the 13 hoodlums who had been arrested at the first La Stella luncheon. Why else would those persons state, as reported in the New York Daily News and the New York Times clippings of October 1, 1966, "Why don't they arrest us now?" But whether or not the second luncheon was actually a gesture of contempt and a staged performance in which Wasserman was playing a part, in which case the article is true, is immaterial here. What is material is that petitioner's employees certainly thought that it was a gesture of contempt in which Wasserman was playing a part and so testified. All of the information available to the editor, writer and researcher, including the photograph which speaks for itself, and the articles in the New York Times and the New York Daily News, clearly supported that conclusion.

To put it another way, petitioner's employees testified that there would be nothing wrong with Wasserman as an attorney going out to lunch with his clients. Neither would there be anything newsworthy about it. However, for an attorney to go out to lunch with his clients to the same restaurants where they were originally arrested and, against the background of the prior arrest and refusal to testify, to participate in the second lunch where it was stated, "Why don't they arrest us now?" is quite a different matter. This was not a simple luncheon attended by an attorney and his clients—this was a staged performance and the New York Times and the New York Daily News on which petitioner relied, so reported it. More to the point,

under the facts of this case, petitioner's employees certainly had a right to believe that the second luncheon was a staged performance for the benefit of the press, complete with toasts to the photographers and mock expressions of amazement that no arrests were made. That should be the end of the matter, particularly since there is no showing that petitioner's employees published with knowledge of falsity or with serious doubts as to truth.

(b) The Circuit Court's unsound journalistic judgment.

In hinging its legal reasoning and factual analysis on the sole fact that Wasserman was an attorney and was not identified as such, the court below substituted its editorial judgment for that of petitioner. As shown in the preceding part of this petition, the focus of the Time article as the editor, writer and researcher interpreted it, and with ample basis, was upon the second La Stella luncheon as a newsworthy event in itself—a vignette of the contemptuous challenge which hoodlums can offer law enforcement. Time was not reporting on a group of Cosa Nostra leaders lunching with their attorneys. Instead, it was reporting on a group of individuals who were playing a role on behalf of a larger group of hoodlums that preceded them. Freedom of the press will have reached a sorry state, if, as a matter of law, attorneys are required to be identified as such whether or not their activities bear a relationship to their professional status, and if articles on matters of public interest are to be written as courts think they should be rather than as a publisher honestly believes is necessary for truthful reporting.

The court below assumed that since Wasserman was an attorney he could only attend the luncheon in his capacity as an attorney. The fallacy is obvious and this would be equally true if Wasserman had been a police officer or a businessman. Both the New York Times and the New York

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Daily News, on which petitioner relied and which it believed to be responsible publishers who published accurate accounts of the events, stated that the individuals at the second luncheon, including Wasserman, were conducting a staged performance and were disdainful and contemptuous. Even if this were wrong, petitioner was entitled to convey the impression which Wasserman and his luncheon companions thus created, since petitioner had reason to believe it was true, did not have serious doubts as to its truth and did not have information to the contrary.

More to the point, how can a publisher, who omits from its publication what it honestly believes to be irrelevant facts, be charged with "actual malice" when he would not be for affirmative misstatements honestly made? Obviously, if Wasserman was not at the second luncheon in his capacity as a lawyer, or at least if petitioner believed that or did not have serious doubts to the contrary, knowledge that Wasserman was a lawyer was totally irrelevant to the subject matter of the publication. Since petitioner in good faith believed that the individuals at the second luncheon, including Wasserman, returned to La Stella as representatives of the original group, *i.e.*, that Wasserman was an *actor* and not a *lawyer*, petitioner was entitled so to publish even if ultimately proved wrong.

The District Court clearly agreed with this position, with the truth of the Time story, and with the good faith of the editor, writer and researcher. Even the Circuit Court referred to "Time in its editorial decision reached in good faith". That agreement, it seems to us, is significant. If petitioner's position was sufficient to convince the District Court, that position even if erroneous as to the literal and technical truth of the story, can hardly give rise to that "high degree of awareness of probable falsity" which is needed before the protection of the Constitution can be lost.

(c) The Circuit Court's focus upon a single isolated fact in disregard of the entire record, in conflict with decisions of this Court and other Circuits.

The decision below is diametrically in conflict with decisions of this Court and other Circuits (except for the Seventh Circuit in *Pape*) in defining and applying the *New York Times* concept of actual malice. The Circuit Court here has isolated and focused entirely upon one single factor to find actual malice, to the complete exclusion and disregard of all other evidence concerning the editorial methodology followed in preparation of the article and the uncontradicted beliefs of the editor, writer and researcher that it was true. Other *New York Times* decisions have rejected such a constrictive approach and have held that *all* evidence pertaining to the publication and its origin must be considered to establish actual malice with the "convincing clarity" required by the First Amendment.

The approach of the court below in considering one single and narrow factor (omission of "attorney") rather than *all* elements of the editorial process in writing and research of the article, is in square conflict with the decisions of other Circuits under the *New York Times* doctrine and that of *New York Times* itself. Virtually all other courts, both federal and state, have followed the constitutional mandate of *New York Times* and have examined *all* facts behind the preparation and writing of the publication in determining whether actual malice is a jury issue.

The evidence that this Court held insufficient in *New York Times* to support a finding of actual malice was manifestly stronger than that adduced by Wasserman below. Thus, in *New York Times,* the trial record disclosed:

1. The New York Times had evidence in its own files (from news material it had previously published)

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demonstrating the falsity of several statements in the publication (376 U. S. at 263, 287-8).

2. The Secretary of The New York Times Company admitted he could readily discern that on its very face at least one statement in the publication was false (*id.*, pp. 263-4).

3. The New York Times accepted and published the assailed advertisement without checking its accuracy against *anything*—either outside sources or the paper's own files (*id.*, p. 287).

Upon such a showing this Court held that the Times could not be found guilty of actual malice because the evidence would support "at most a finding of negligence" (*id.*, p. 288). The court below disregarded the entire methodology of the editor, writer and researcher and focused solely upon the omission of the word "attorney". If this Court had followed the same approach in *New York Times* and looked at only one fact (such as the materials in the Times' files), this Court clearly would have found a sufficient basis for a finding of actual malice. Instead, this Court considered *all* of the facts concerning the method and processes followed in making the publication and held that there was no actual malice as a matter of law.

The decision below also squarely conflicts with *St. Amant* v. *Thompson*, 390 U. S. 727 (1968). There the record revealed that the defendant publisher had made *no* attempt to check or verify the truth of the alleged libel, had *no* knowledge of the plaintiff's past conduct, and had relied solely on the affidavit of a stranger whose veracity and credibility were unknown. This Court nonetheless held that the plaintiff had failed as a matter of law to make a submissible showing of actual malice in the sense of "reck-

lessness"; this Court declared that recklessness requires proof that the defendant *"in fact entertained serious doubts* as to the truth" of the alleged libel (390 U. S. at 730, emphasis added). Here, we submit, Wasserman has made not the remotest showing that either the editor, the writer, the researcher or anyone at Time, Inc. entertained "serious doubts as to the truth" of the Time article.

So also, the decision below is in flat conflict with *Beckley Newspaper Corp.* v. *Hanks,* 389 U. S. 81 (1969). In *Beckley* the defendant newspaper had accused the plaintiff of intimidation, threats and other misconduct as a public official; defendant admitted that (unlike the instant case) *no* research or investigation had been conducted concerning the accusations, and that they were published because defendant believed there was a *possibility* they were true. This Court, in reversing a judgment for the plaintiff *per curiam,* considered the entire record and held that the evidence was insufficient to present a jury question of whether defendant acted recklessly. Again, the proof of actual malice in the instant case falls palpably short of the evidence held insufficient to go to the jury in *Beckley.* Here the article was comprehensively researched in accordance with Time's standard editorial procedure, and the editor, the writer and the researcher all believed the article *was in fact true,* not merely that there was a *possibility* it was true (as in *Beckley*).

Decisions of other Circuits have held that defendant-publishers are entitled to summary judgment or dismissal without the necessity of submitting the case to a jury when it appears on the basis of *all* affidavits, depositions or other adduced evidence that the plaintiff cannot sustain his burden of proving actual malice. Thus, in *Time, Inc.* v. *McLaney,* 446 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969), the Fifth Circuit observed that a "substantial investigation" had been made into the truth of the

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alleged libel and that the author had no reason to have serious doubts as to the truth of the publication. Precisely the same is true, we submit, in the instant case.*

3. The gravely "chilling effect" of this litigation.

Summary judgment is essential here. Organized crime is a matter of consuming public concern. Its leaders do not like press exposes, but they like even less to sue for them. None of the named Cosa Nostra leaders at the La Stella luncheon on September 22 and 30, 1966 have brought libel actions, and for good reasons.** But if their lawyers, such as Wasserman and Ragano, are free to participate with them in a staged gesture of defiance such as disclosed by the record in this case, and then bring suits which survive summary disposition, organized crime will have found an easy way to exert the "chilling effect" on press discussion of its activities which the Constitution is supposed to prevent. Not only will publishers such as petitioner be put to the expense of a protracted trial, but their defense will be

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*Equally in conflict with the holding below are *New York Times Co.* v. *Connor*, 365 F. 2d 567 (5th Cir. 1966); *United Medical Laboratories* v. *CBS*, 404 F. 2d 706 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969); *Bon Air Hotel, Inc.* v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Klahr* v. *Winterble*, 418 P. 2d 404 (Ariz. Ct. App. 1966); *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967 (D. Minn. 1967), *aff'd*, 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 884; *Tagawa* v. *Maui Pub. Co.*, 448 P. 2d 337 (Sup. Ct. Hawaii 1968), *cert. denied*, 396 U. S. 822 (1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd*, F. 2d (3d Cir. 1970).

**Wasserman testified that he and his client, Carlos Marcello, "determined the better part of discretion was [for Marcello] not to file a lawsuit . . . in view of the fact that all around it might be better not to expose himself to the kind of searching pre-trial depositions that are customary in libel actions" (W. Dep., App. 194).

hampered by invocation of the lawyer-client privilege between the attorney and the mobster.*

Both this Court and the Circuit and District Courts have recognized and squarely held that avoidance of a "chilling effect" is necessary to maintain the vitality of the First Amendment. The instant case, and its companion *Ragano* suit and the proceedings which have been had in them, place in bold relief the insidious and chilling effect of a failure to terminate a libel suit involving publications dealing with matters of public interest at the earliest possible moment. The petitioner has been in litigation since 1966 and has been required to defend extensive pretrial proceedings in both actions and two appeals. In the *Ragano* case, it was necessary three times to move for summary judgment before leave to appeal was finally granted by Judge Krentzman. Also, that case was set for trial twice in Tampa, Florida, with defendant's counsel and all witnesses (from New York) present and ready for trial, and then adjourned. And now the Wasserman case is being sent back for trial in the

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*Both Wasserman and Ragano at the taking of their depositions in their respective actions invoked the attorney-client privilege concerning their communications with their clients, with one exception—Wasserman's inherently incredible statement that Carlos Marcello was in New York City in September, 1966, for the purpose of raising funds for an "old ladies' home" (W. Dep., App. 251).

It is also noteworthy that when the depositions of Carlos Marcello, Joseph Marcello and Santo Trafficante were taken in the companion *Ragano* action, all gave their names and addresses and then proceeded to take the Fifth Amendment with respect to each and every question asked them. Similarly, in this action, Wasserman stipulated that if the depositions of Carlos and Joseph Marcello were taken, they would refuse to answer on the same grounds.

Such actions, effectively closing the doors to discovery of the truth, illustrate conclusively the wisdom of the constitutional protection. As long as a publisher acts in good faith without knowledge of falsity or serious doubts of truth, it should not be subject to the pendency of libel actions such as the instant ones brought by Wasserman and Ragano; and, where a publisher is, summary disposition should be granted.

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District of Columbia. The time and expense involved in these two cases stemming from one short miscellany item printed in October 1966, is appalling. A publisher with less financial resources than Time Inc. would have long since capitulated in these cases and resolved, for the future, to steer far wide of reporting the truth as he honestly believes it lest libel litigation result. If the decision below is allowed to stand, "free expression * * * might be the loser", *Dombrowski* v. *Pfister,* 380 U. S. 479, 486 (1965).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

April 22, 1970.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

JACK WASSERMAN, Plaintiff, v. TIME, INC., Defendant.	Civil Action No. 2925-66 [FILED May 29 1969 Robert M. Stearns, Clerk]

Order

This case having come on for hearing on defendant's motion for summary judgment and on plaintiff's motion for interlocutory summary judgment, and the Court having heard argument and it appearing that there is no genuine issue as to any material fact and that defendant is entitled to judgment as a matter of law,

IT IS, THEREFORE, ORDERED:

1. Defendant's motion for summary judgment be, and it hereby is, granted.

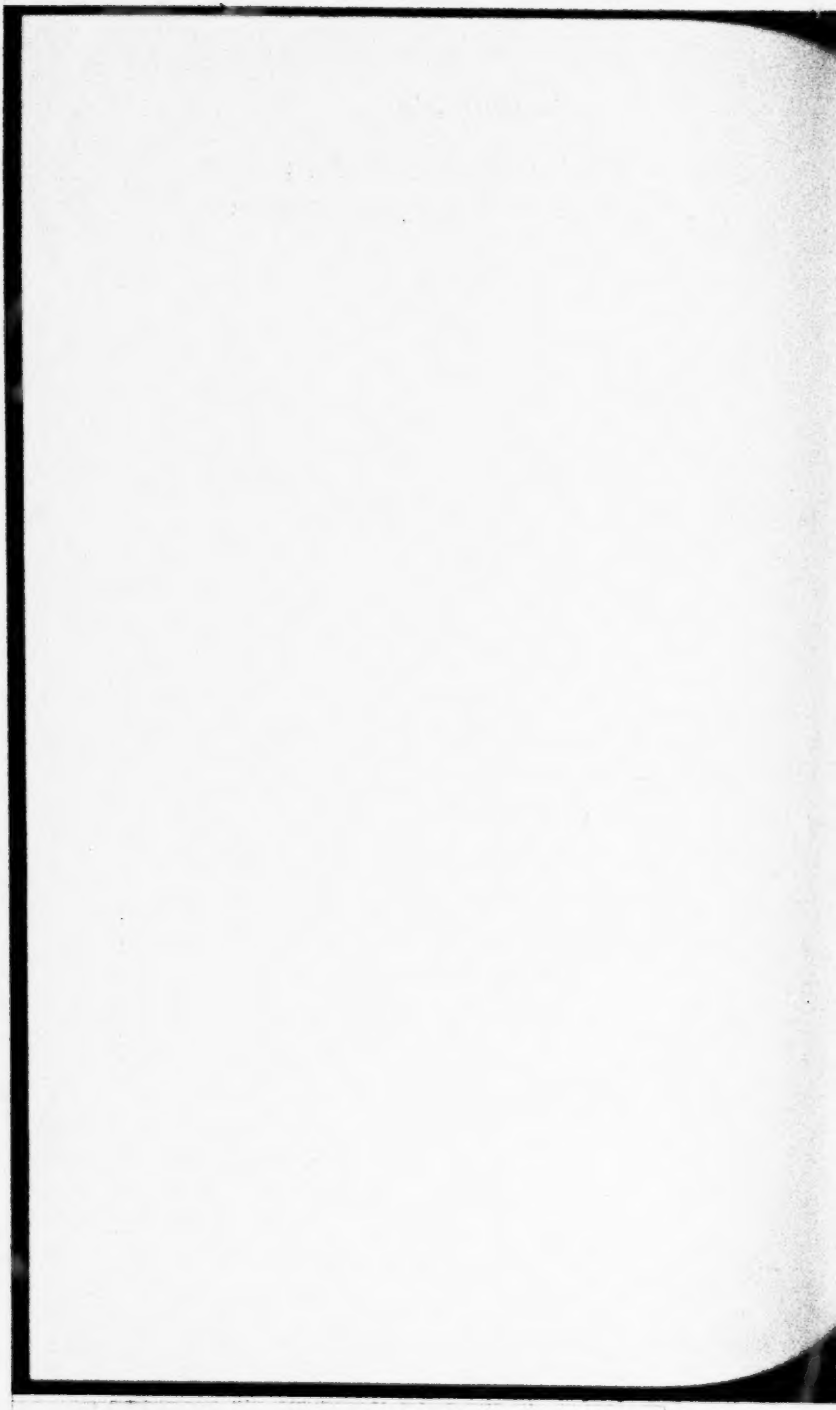
2. Plaintiff's motion for interlocutory summary judgment be, and it hereby is, denied.

3. Judgment is entered in favor of defendant and against the plaintiff, and the complaint is dismissed.

Dated this *27th* day of May, 1969.

/s/ AUBREY E. ROBINSON, JR.
United States District Judge

No objection as to form:
/s/ CHESTER C. SHORE
Chester C. Shore
Attorney for Plaintiff



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APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,267

JACK WASSERMAN, APPELLANT

v.

TIME, INC.

Appeal from the United States District Court
for the District of Columbia

Decided March 3, 1970

Mr. Chester C. Shore for appellant.

Mr. Harold R. Medina, Jr., of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom *Messrs. John H. Pickering* and *Dennis M. Flannery* were on the brief, for appellee.

Before FAHY, *Senior Circuit Judge*, and WRIGHT and ROBINSON, *Circuit Judges*.

PER CURIAM: On cross motions in appellant's action for libel in the District Court against appellee Time, Inc., the court granted summary judgment in favor of Time, and dismissed appellant's complaint. He appeals.

Appendix B

Time publishes a weekly magazine with national circulation. In its issue of October 7, 1966, it published a photograph of seven men sitting at a table in a restaurant in Queens, New York. One of the men was appellant, a member of the bar of this court in active practice. Another was Frank Ragano, also an attorney. Accompanying the photograph was a brief article which referred to the occasion as a meeting even " 'bigger than Apalachin' of top Cosa Nostra hoodlums." The article also referred to the occasion as a delayed lunch which had been interrupted by the police because the District Attorney wanted the men before a grand jury on crime in Queens, that a judge had set bail at $100,000 each, that this had been met, and that the grand jury got only grunts.

Ragano sued Time for libel in the United States District Court for the Middle District of Florida.[1] In that case Time moved for summary judgment on the basis of the freedom of press protected by the First Amendment. Judge Krentzman denied the motion. He held that if the statement was understood as defamatory it was not protected by the ruling announced in *New York Times* v. *Sullivan,* 376 U. S. 254 (1964), if the statement was false and made with actual malice, that is, with knowledge of its falsity or in reckless disregard of whether it was true or false. He held as to Mr. Ragano that under these criteria the publication was with actual malice. He accordingly denied Time's motion for summary judgment and held that it was for the jury to determine whether or not the article was in fact understood as defamatory.

We accept the position of Time, as Judge Krentzman did, that the standards of *New York Times* v. *Sullivan, supra,*

[1] *Ragano* v. *Time, Inc.,* 302 F. Supp. 1005 (M. D. Fla. 1969), *appeal docketed,* 5th Cir. 1969.

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are applicable even though appellant was not a public official, since he was engaged in a matter of public interest and concern.[2] However, as more fully appears in the opinion of Judge Krentzman, it is undisputed that Time knew that Wasserman, like Ragano, was an attorney for one or more of the men in the group referred to in the article and was not one of those called before the grand jury and released on $100,000 bail. Time's position is that by attending the delayed lunch meeting the attorneys were playing a part and were engaging in a demonstration defiant of the law, which justified Time in its editorial decision reached in good faith not to refer to appellant and Ragano as attorneys, but to place them in the same category as the others characterized in the article as we have set forth. Such a decision on the part of the editors of Time, however, would not preclude responsibility for any defamation known to be false or made with reckless disregard of the truth.

The judgment is reversed and the case is remanded for trial on the issues of actual malice, defamation and possible damages.

Reversed and remanded for further proceedings consistent with this opinion.

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[2]*See* cases cited in *Ragano, supra,* 302 F. Supp. at 1006-07, n. 1.

WRIGHT, *Circuit Judge, concurring:* I concur in the court's opinion. My attempt here is to set out what I conceive to be the proper procedure in handling the issue of actual malice in *New York Times Co.* v. *Sullivan*[1] cases.

In my judgment *New York Times Co.* v. *Sullivan* makes actual malice a constitutional issue to be decided in the first instance by the trial judge applying the *Times* test of actual knowledge or reckless disregard of the truth.[2] *Cf. Jackson* v. *Denno*, 378 U. S. 368 (1964). Unless the court finds, on the basis of pretrial affidavits, depositions or other documentary evidence, that the plaintiff can prove actual malice in the *Times* sense, it should grant summary judgment for the defendant. *Washington Post Co.* v. *Keogh*, 125 U. S. App. D. C. 32, 365 F. 2d 965 (1966), *cert. denied*, 385 U. S. 1011 (1967). *Compare Goldwater* v. *Ginzburg*, 2 Cir., 414 F. 2d 324, 336-337 (1969), *cert. denied*, —— U. S. ——, 38 U. S. L. WEEK 3279 (January 26, 1970).

If the case survives the defendant's summary judgment motion, the trial court at the close of the plaintiff's case must decide whether actual malice has been shown with "convincing clarity."[3] In making this judgment the court will judge the credibility of the witnesses and draw its own inferences from the evidence. If the trial is permitted to proceed, the court will be called upon again to make a judgment on the actual malice issue at the close of all of the evidence. If the motion for a directed verdict at this stage of the trial is denied, the actual malice issue, along with the other issues, is then submitted to the jury under the *Times*

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[1] 376 U. S. 254 (1964).

[2] *Compare Rosenblatt* v. *Baer*, 383 U. S. 75, 88 (1966): "We remark only that, as is the case with questions of privilege generally, [in a libel case] it is for the trial judge in the first instance to determine whether the proofs show respondent to be a 'public official.'"

[3] *New York Times Co.* v. *Sullivan*, *supra* Note 1, 376 U. S. at 285-286.

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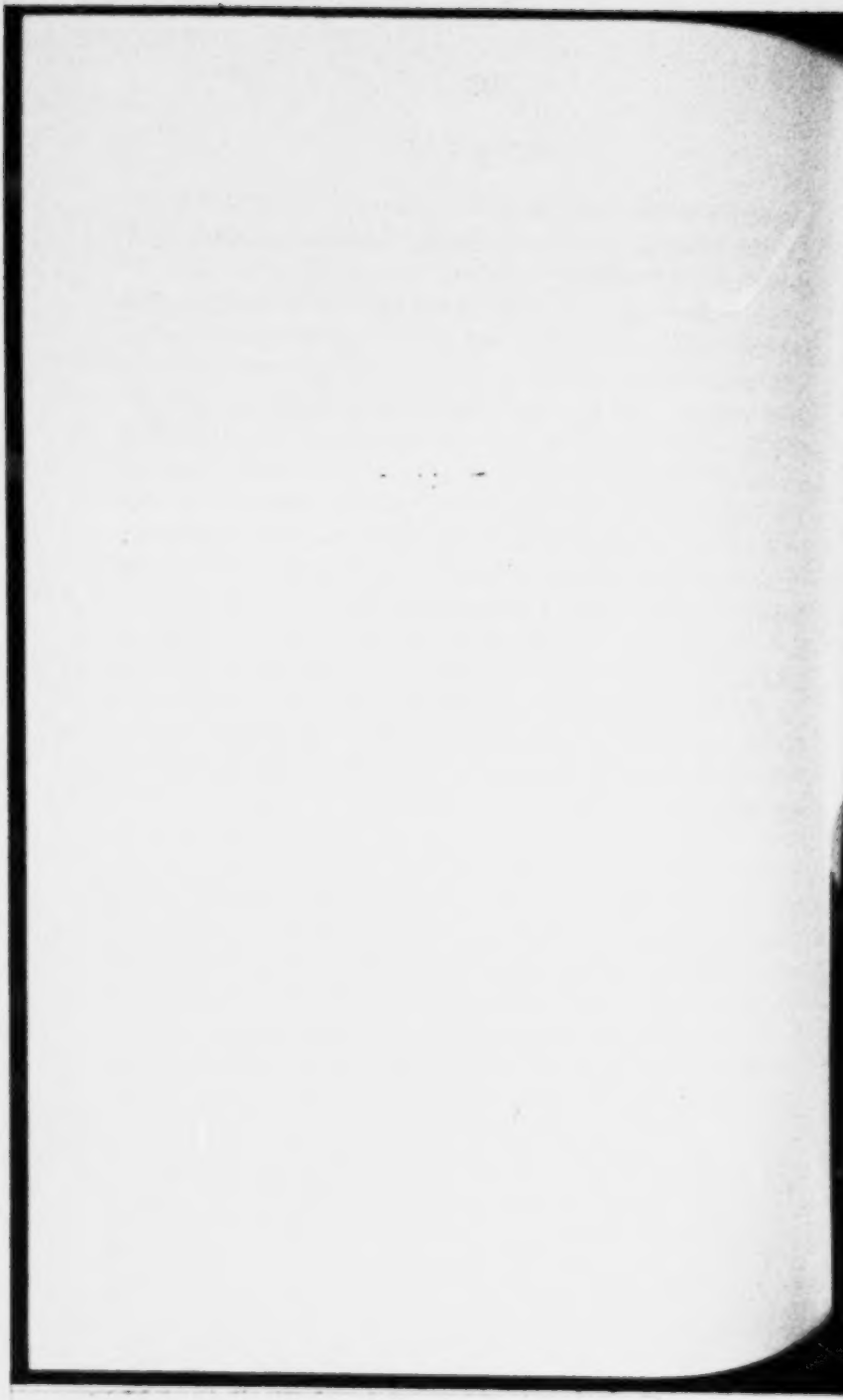
instruction without any indication from the court or counsel that the court has decided that the evidence shows actual malice with "convincing clarity."

This two-step procedure in which both the trial judge and the jury must find actual malice before there can be judgment for the plaintiff provides the protection of the First Amendment freedom that *Times* sought to make secure in areas of public concern. As the Court stated in *Rosenblatt* v. *Baer* in support of its requirement that the trial judge in the first instance determine whether the evidence shows the plaintiff in a libel suit to be a public official: "Such a course will both lessen the possibility that a jury will use the cloak of a general verdict to punish unpopular ideas or speakers, and assure an appellate court the record and findings required for review of constitutional decisions. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 525; *New York Times*, 376 U. S., at 285." 383 U. S. at 88 n. 15.

I am authorized to say that Judge Robinson concurs in this opinion.



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PEOPLE

Considering the 6-ft. 8-in. size of the man, it was like looking for a needle in a bonefish. Dining with University of British Columbia dons in Vancouver, Harvard Economist **John Kenneth Galbraith**, 57, choked on a bony hunk of the area's famed broiled salmon. As he told it, "There followed a contest, between myself and the salmon, that was a great sporting event on the whole. At the hospital, they tried casting for it; then they trolled for it, and that didn't work either. And then, after they used a general anesthetic, I learned that they had tried a fly, but finally extracted it with an old-fashioned worm." Fish story or no, once unplugged, Galbraith politely took his hosts off the hook, said, "I'm sure my salmon was one of the finest local species."

• • •

Most of the alumni don't feel overly rah-rah about Tacoma's McNeil Island Federal Penitentiary; but for ex-Teamsters Boss **Dave Beck**, 72, the place was a veritable Vic Tanny's West. Released 22 months ago, after serving half of a five-year stretch for income tax evasion, Beck boasts that "I came out in better shape than I went in." Since the kind of *Gemütlichkeit* that goes with his $50,000-a-year Teamsters pension was out

each other," beamed Humphrey, obv
ously tickled at the mere nine-minu
drive from his Capitol office.

• • •

The boys had barely finished the
cocktails in La Stella's restaurant o
in Queens, when New York's fine
burst into the joint to bust up what t
Queens D.A. called a meeting ev
"bigger than Apalachin" of top Co
Nostra hoodlums from New Yor
Florida and Louisiana. It did look li
a summit at that: **Santo** ("Louis Sa
tos") **Trafficante**, 51, boss of Cub
pre-Castro gambling. **Thomas** ("To
my Ryan") **Eboli**, 55, running t

cian: Dmitri's 28-year-old son Maxim.

• • •

Evangelist Billy Graham's huge sum-
er crusade did not so much as rattle
window in Lambeth Palace, residence
the Church of England's Archbishop
Canterbury, the Most Rev. Michael
oomsey, 61. Slipping off a plane in
ancouver, B.C., during a swing of his
wn through western Canada, Ram-
sey conceded that Billy may have "won
me converts" but insisted that "we
on't need his type of evangelism in
ngland." In these perilous times, he
ontinued, England "needs a thought-
l approach to religion, not bursts of
motionalism." Mused Billy, in thought-
l reply: "Interesting, in view of his
cumenical claims."

APPENDIX D

The Public Interest Test

Although some courts were initially misled by some of the language in *New York Times* into believing that the principle which it announced was limited in its application to statements about "public officials", it is now quite clear that that concept as well as that of "public figure" are simply facets of and are embraced within the broader concept of "public interest".

It is true that *New York Times* dealt only with "public officials". However, this Court quickly moved to make clear that *New York Times* was not to be so narrowly interpreted. In his opinion for the Court in *Rosenblatt* v. *Baer*, 383 U. S. 75 (1966), Justice Brennan wrote:

> "... we reject any suggestion that our references in *New York Times*, 376 U. S. at 282, 283, n. 23, and *Garrison*, 379 U. S. 564, to *Barr* v. *Matteo*, 360 U. S. 564, mean that we have tied the *New York Times* rule to the rule of official privilege. The public interests protected by the *New York Times* rule are interests in discussion, not retaliation, and our reference to Barr should be taken to mean no more than that the scope of the privilege is to be determined by reference to the functions it serves. *See* Pedrick, Freedom of the Press and the Law of Libel: The Modern Revised Translation, 49 Cornell L. Q. 581, 590-591 (1964)." 338 U. S. at pp. 84-95 n. 10.

The article by Pedrick, referred to in Justice Brennan's opinion, stated the policy grounds for the *New York Times* rule as follows:

> "... If a qualified 'good faith' privilege is needed to better assure open debate then the privilege ought

> to extend as stated by Judge Burch of Kansas to 'all matters of public concern.' The logic is simple. In modern democratic society the public judgment makes itself felt on a great variety of subjects in a great variety of ways, official and unofficial. If decision on these matters is to be adequately informed every effort ought to be made to free the channels of communication with respect to these subjects. . . . The determination of 'matters of public concern' should thus become the key to the application of the privilege recognized in the *Times* decision." p. 592.

Pedrick argued that the protection went far beyond comment directed at public officials:

> ". . . But those matters which are of public concern also go beyond the immediate province of government. A threatened labor strike affecting a critical industry may not provide any immediately discernible role for public opinion but who would doubt the legitimacy of the public concern and the strategic significance of the public attitude. Even such pedestrian matters as the closing hours observed by business establishments, the hiring, retention, or dismissal of a symphony conductor or an athletic coach would seem clearly matters of proper public concern with respect to which the popular will plays a role." p. 593 (footnotes omitted).

If there were any doubt on the subject, it was set to rest in *Time, Inc.* v. *Hill*, 385 U. S. 374 (1967). Justice Brennan stated in his opinion for the Court:

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". . . We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress false reports of matters of public interest in the absence of proof that the defendant published the report with knowledge of its falsity or in reckless disregard of the truth.

"The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government. . . . We have no doubt that the subject of the Life article, the opening of a new play linked to an actual incident, is a matter of public interest. . . . Erroneous statement is no less inevitable in such a case than in the case of comment upon public affairs, and in both, if innocent or merely negligent, '. . . it must be protected if the freedoms of expression are to have the "breathing space" that they "need . . . to survive". . . .' *New York Times Co.* v. *Sullivan, supra,* at 271-272. . . ." 385 U. S. at pp. 387-88.

It is true that this Court explicitly left open the question of whether the "public interest" rule in its full sweep should apply to defamation actions in addition to the privacy action involved in *Hill.* However, in its next decision in *Butts,* a defamation action, the Court again referred to the public interest test.

Justice Harlan's opinion which announced the judgment of the Court relied on a phrase from *Thornhill* v. *Alabama,* 310 U. S. 88 (1940), that freedom of discussion " 'must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.' " 388 U. S. at p. 147. He noted that "we have rejected, in prior cases involving

materials and persons commanding justified and important public interest, the argument that a finding of falsity alone should strip protections from the publisher". *Id.* at p. 152. He concluded:

> ". . . We note that the public interest in the circulation of the materials here involved, and the publisher's interest in circulating them, is not less than that involved in *New York Times.* . . ." p. 154.

And, in *St. Amant* v. *Thompson,* 390 U. S. 727, 731 (1968), the Court elaborated upon the constitutional safeguards established by its decision and drew no distinction between publications dealing with public officials and those dealing with public figures and matters of public interest.

Against that background the Court of Appeals for the Ninth Circuit in *United Medical Laboratories* v. *CBS,* 404 F. 2d 706 (1968), *cert. denied,* 394 U. S. 921 (1969), the Court of Appeals for the Fifth Circuit in *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (1969), *cert. denied,* 395 U. S. 922 (1969) and the Court of Appeals for the Third Circuit in *Rosenbloom* v. *Metromedia, Inc.,* 415 F. 2d 892 (3d Cir. 1969), *cert. granted,* 38 U. S. L. W. 3309 (U. S. Feb. 24, 1970) have explicitly accepted the principle that the "public interest" rationale specifically applies to defamation actions. Thus the Court in *United Medical Laboratories* stated:

> ". . . If the publications here are within the field of First Amendment protection at all as against the consequences of state libel law, the area of public interest to which they relate—conditions allegedly capable of wide-spreadedly affecting public health—would seem to us to be one of such inherent public concern and stake that there could be no possible

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question as to the applicability of the *New York Times* standard for any defeasance.

"The crucial question here then is whether First Amendment immunity can properly be regarded as extending to disclosure and discussion of professional practices and conditions in the health area involved, so that those engaged in the particular field who may claim to have been stained by such a publication will be subject, in any seeking of redress, to application of the federal standard for defeasance of the Amendment immunity, instead of to the standards of state libel law for recovery.

"We have no difficulty in so concluding." 404 F. 2d at p. 711.

In *McLaney,* the Fifth Circuit followed the lead of the Ninth Circuit:

". . . [W]e agree with the Court of Appeals for the Ninth Circuit which in its recent case, United Medical Laboratories, Inc. v. Columbia Broadcasting System, Inc., et al. (9th Cir.) D. C., 404 F. 2d 706, November 18, 1968, said: The standard of New York Times was not to be regarded as having had "its outer limits* * * marked out" so as not to be open to further definition.'

"We conclude that the constitutional privilege extends to discussions by specific individuals, not associated with any government, if those individuals are involved in matters of important public concern. . . ." 406 F. 2d at 573.

Similarly, the Court in *Rosenbloom* stated its holding as follows:

> ". . . [W]e conclude that the fact that plaintiff was not a public figure cannot be accorded decisive importance if the recognized important guarantees of the First Amendment are to be adequately implemented. In Time, Inc. v. Hill, supra, the Court applied the Times rule to false reporting of 'matters of public interest' in connection with an action for invasion of the right to privacy by a private individual. See also Linn v. United Plant Guard Workers, 383 U. S. 53 (1966), and Pickering v. Board of Education, 391 U. S. 563 (1968). Our conclusion finds support in similar rulings of other courts. United Medical Laboratories v. Columbia Broadcasting System, 404 F. 2d 706 (9th Cir. 1968), cert. den., 394 U. S. 921 (1969); Bon Air Hotel, Inc. v. Time, Inc., 295 F. Supp. 704 (S. D. Ga. 1969); All Diet Foods Distributors, Inc. v. Time, Inc., 290 N. Y. S. 2d 445 (Sup. Ct. 1967). See also Time, Inc. v. McLaney, 406 F. 2d 565 (5th Cir. 1969), cert. den., 395 U. S. 922 (1969)."

The guiding principle stated by this Court in *Thornhill* v. *Alabama, supra*—freedom of discussion on all subjects—was quoted in *Rosenblatt* v. *Baer,* 383 U. S. at pp. 89-90 (1965) (concurring opinion of Justice Douglas); *Hill,* 385 U. S. at p. 388; and *Butts,* 388 U. S. at p. 147. To the extent, then, that the Court has referred to the "public figure" status of a plaintiff, the term means a figure in whom the public has an interest, not necessarily a figure who is public. For example, the activities of a Russian spy ring in New York entirely unknown to the public would render the members of that ring a legitimate subject of

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inquiry since the public has an interest in those activities. Thus, in *McLaney,* the Court determined that the privilege applied to statements concerning a professional gambler who tried to remain anonymous because of the nature of his activities.

In addition to the Supreme Court and Circuit Court decisions, lower court decisions have expressly held that public interest was the basis for application of the constitutional test in defamation. *Cullen* v. *Grove Press,* 276 F. Supp. 727 (S. D. N. Y. 1967); *Altoona Clay Products* v. *Dun & Bradstreet,* 286 F. Supp. 899 (W. D. Pa. 1968). Those lower court decisions have also included several in which Time, Inc. has been a party. *All Diet Food Distributors, Inc.* v. *Time, Inc.,* 56 Misc. 2d 821, 290 N. Y. S. 2d 445 (Sup. Ct. N. Y. County 1967); *Bon Air* v. *Time, Inc.,* 295 F. Supp. 704 (S. D. Ga. 1969); *Sellers* v. *Time, Inc.,* 299 F. Supp. 582 (E. D. Pa. 1969), *aff'd,* —— F. 2d —— (3d Cir. 1970); *Cerrito* v. *Time, Inc.,* 302 F. Supp. 1071 (N. D. Cal. 1969).

It can no longer be doubted that the constitutional privilege announced in *New York Times* applies to all applications regarding matters as to which the public has a right to be informed. The crux of the matter was aptly put by Judge Lawrence in his decision in *Bon Air Hotel, Inc.* v. *Time, Inc.,* 295 F. Supp. 704, 705 (S. D. Ga. 1969):

> "Whatever solid ground plaintiff's case originally stood on has been steadily eroded by the sweep and flow of First Amendment freedoms through new and wider channels."

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APPENDIX E

The Actual Malice Standard

This Court has laid down the following constitutional standard for articles which are entitled to protection: A plaintiff may not recover unless he proves with "convincing clarity" that the article was published with "actual malice"—"that is, with knowledge that it was false or with reckless disregard of whether it was false or not" 376 U. S. at 280. And it is for the courts to determine whether this standard has been met—they must examine the statements in issue and the circumstances under which they were made to see whether the proof presented to show "actual malice" has "the convincing clarity which the constitutional standard demands. . . ." *New York Times,* 376 U. S. at 285-86.

These principles—enunciated in *New York Times* and repeated in *Garrison* v. *Louisiana,* 379 U. S. 64, 74 (1964), have remained constant as this Court has extended the doctrine of *New York Times* to articles involving public figures and matters of public interest. In *St. Amant* v. *Thompson,* 390 U. S. 727 (1968), the Court explained that in cases concerning publications dealing with public figures and matters of public interest, as well as public officials, a plaintiff has the burden of showing that the publication is made with "actual malice" as defined in *New York Times* and later cases. The Court went on to explain what its cases mean with respect to the "reckless disregard" branch of its "actual malice" rule:

> "These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts

shows reckless disregard for truth or falsity and demonstrates actual malice." 390 U. S. at p. 731.

And the Court went on to emphasize that nothing less would "adequately implement First Amendment policies", stating:

"It may be said that such a test puts a premium on ignorance, encourages the irresponsible publisher not to inquire, and permits the issue to be determined by the defendant's testimony that he published the statement in good faith and unaware of its probable falsity. Concededly the reckless disregard standard may permit recovery in fewer situations than would a rule that publishers must satisfy the standard of the reasonable man or the prudent publisher. But *New York Times* and succeeding cases have emphasized that the stake of the people in public business and the conduct of public officials is so great that neither the defense of truth nor the standard of ordinary care would protect against self-censorship and thus adequately implement First Amendment policies. Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation. But to insure the ascertainment and publication of the truth about public affairs, it is essential that the First Amendment protect some erroneous publications as well as true ones. We adhere to this view and to the line which our cases have drawn between false communications which are protected and those which are not." *Id.* at pp. 731-32.

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Appendix E

The burden of proving actual malice is on the plaintiff, *Cepeda* v. *Cowles Magazines & Broadcasting, Inc.*, 392 F. 2d 417 (9th Cir. 1968), who must make an affirmative showing of facts from which defendant's probable knowledge of falsity may be constitutionally sustained. *Thompson* v. *Evening Star Newspaper Co.*, 394 F. 2d 774, 776 (D. C. Cir. 1968), *cert. denied*, 393 U. S. 884 (1968). The mere hope of questioning the credibility of defendant's witnesses is not sufficient to resist summary judgment. *Hurley* v. *Northwest Publications, Inc.*, 273 F. Supp. 967, 974 (D. Minn. 1967), *aff'd on opinion below*, 398 F. 2d 346 (8th Cir. 1968). Where testimony stands uncontradicted and the adverse party has no basis on which to question the credibility of the witnesses so testifying, their assertions must be accepted as true. *See Orvis* v. *Brickman*, 196 F. 2d 762, 765-6 (D. C. Cir. 1952); *Gifford* v. *Travelers Protective Assn.*, 153 F. 2d 209, 211 (9th Cir. 1946); *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 718 (2d Cir. 1943).

Further, "actual malice" may not be presumed or inferred from the nature of the defamatory statement, *Washinton Post Co.* v. *Keogh*, 365 F. 2d 965 (D. C. Cir. 1966), *cert. denied*, 385 U. S. 1011 (1967); *Rosenbloom* v. *Metromedia, Inc., supra*, nor from the defendant's failure to retract the allegedly defamatory statement, *New York Times*, 376 U. S. at 286; *United Medical Laboratories, Inc.* v. *Columbia Broadcasting System, Inc.*, 404 F. 2d 706, 713 (9th Cir. 1968), *cert. denied*, 394 U. S. 921 (1969); *New York Times Co.* v. *Connor*, 365 F. 2d 567, 577 (5th Cir. 1966). Neither may it be inferred from the failure to seek out plaintiff to verify facts before publication, *Hurley* v. *Northwest Publications, Inc., supra*, nor from a failure to investigate, *Beckley Newspapers Corp.* v. *Hanks*, 389 U .S. 81 (1967).

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APPENDIX F

The Necessity for Summary Judgment

This Court has emphatically noted that one of the greatest deterrents to free discussion of matters of public interest is fear that publication might result in a libel action entailing an expensive defense to prove truth.

> "[W]ould be critics . . . may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone.' *Speiser* v. *Randall, supra,* 357 U. S. at 526. The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments." *New York Times Co.* v. *Sullivan,* 376 U. S. 254, 279 (1964).

This Court has specifically noted that fear of expense of trial is as great a threat to freedom of press as fear of large verdicts:

> "Fear of large verdicts in damage suits for innocent or mere negligent misstatement, even fear of the expense involved in their defense, must inevitably cause publishers to 'steer . . . wider of the unlawful zone,' *New York Times Co.* v. *Sullivan,* 376 U. S. at 279; see also *Speiser* v. *Randall,* 357 U. S. 513, 526; *Smith* v. *California,* 361 U. S. 147, 153-154; and thus 'create the danger that the legitimate utterance will be penalized.' *Speiser* v. *Randall, supra,* at 526." *Time, Inc.* v. *Hill,* 385 U. S. 374, 389 (1967).

It is necessary that frivolous libel suits be dismissed summarily to avoid the "chilling effect" on freedom of

speech and press an expensive defense entails. *Dombrowski* v. *Pfister,* 380 U. S. 479, 487 (1965). Thus, the First Amendment guarantee requires that summary judgment be granted as soon as it becomes clear that a plaintiff cannot establish "actual malice". Since Wasserman cannot show "actual malice" with the convincing clarity required, it is necessary that summary judgment be granted.

In *Washington Post Co.* v. *Keogh,* 365 F. 2d 965, 968 (D. C. Cir. 1966), *cert. denied,* 385 U. S. 1011 (1967), the Court held that the defendant was entitled to summary judgment, stating that summary judgment was an essential part of the rules developed to ensure the First Amendment guaranty of freedom of press:

> "In the First Amendment area, summary procedures are even more essential. For the stake here, if harassment succeeds, is free debate. One of the purposes of the *Times* principle, in addition to protecting persons from being cast in damages in libel suits by public officials, is to prevent persons from being discouraged in the full and free exercise of their First Amendment rights with respect to the conduct of their government. The threat of being put to the defense of a lawsuit brought by a popular public official may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself, especially to advocates of unpopular causes. All persons who desire to exercise their right to criticize public officials are not as well equipped financially as the Post to defend against a trial on the merits. Unless persons, including newspapers, desiring to exercise their First Amendment rights are assured freedom from the harassment of lawsuits, they will tend to become self-

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censors. And to this extent debate on public issues and the conduct of public officials will become less uninhibited, less robust and less wideopen, for self-censorship affecting the whole public is 'hardly less virulent for being privately administered.' *Smith* v. *People of California,* 361 U. S. 147, 154, 80 S. Ct. 215, 219, 4 L. Ed. 2d 205 (1959)."

The Court concluded:

". . . The actual malice test, designed to give practical effect to this commitment, precludes an issue of fact in this case." *Id.* at 972 (footnote omitted).

Again, in *Klahr* v. *Winterble,* 4 Ariz. App. 158, 418 P. 2d 404 (Ct. App. 1966), the Arizona Court of Appeals affirmed summary judgment for the defendant finding that the plaintiff could not prove "actual malice" and stated:

"We acknowledge that we are influenced in part in arriving at the conclusion that the plaintiff's affidavit is insufficient by the nature of the case. In New York Times the fact that a threat of lawsuit is in itself an inexorable censor is recognized:

" 'The fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.' 84 S. Ct. at 724.

"If all actions of libel similar to this must go to a full jury trial in order to ascertain whether criticism by analogy, invective and satire is believed

> in 'good faith' to be 'true', the light of freedom of speech and press as enunciated in New York Times will be frustrated." *Id.* at 170, 418 P. 2d at 416.

In *Time, Inc.* v. *McLaney,* 406 F. 2d 565 (5th Cir. 1969), *cert. denied,* 395 U. S. 922 (1969), the Court considered, as in *Keogh,* an appeal from a denial of summary judgment in a libel action. It pointed out that consideration of such interlocutory appeals was an unusual practice, but that it was justified in cases of this kind because "the failure to dismiss a libel suit might necessitate long and expensive trial proceedings, which, if not really warranted, would themselves offend the principles enunciated in *Dombrowski* v. *Pfister,* 380 U. S. 479, 85 Sup. Ct. 1176, 14 L. Ed. 2d 22, because of the chilling effect of such litigation." 406 F. 2d at 566.

The *Keogh* doctrine has been followed in a number of other First Amendment cases, which have granted summary judgment in applying constitutional principles. *New-Journal Co.* v. *Gallagher,* 233 A. 2d 166 (Sup. Ct. Del. 1967); *Hurley* v. *Northwest Publications, Inc.,* 273 F. Supp. 967 (D. Minn. 1967) *aff'd on opinion below* 398 F. 2d 346 (8th Cir. 1968); *Thompson* v. *Evening Star,* 394 F. 2d 774 (D. C. Cir., 1968), *cert. denied,* 393 U. S. 884; *Walker* v. *Pulitzer Pub. Co.,* 394 F. 2d 800 (C. A. 8, 1968); *Ryan* v. *Dionne,* 28 Conn. Sup. 35, 248 A. 2d 583 (1968); *Tagawa* v. *Maui Pub. Co.,* 448 P. 2d 377 (Sup. Ct. Hawaii, 1968) *cert. denied,* 396 U. S. 822 (1969).

That same summary judgment doctrine has specifically been followed in several recent Time Inc. cases in which the Time Inc. editorial process has been fully disclosed to the Court. *E.g., Time, Inc.* v. *McLaney,* 406 F. 2d 565 (C. A. 5, 1969), *cert. denied,* 395 U. S. 922 (1969); *Bon*

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Appendix F

Air Hotel, Inc. v. *Time, Inc.*, 295 F. Supp. 704 (S. D. Ga. 1969); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582 (E. D. Pa. 1969) *aff'd*, F. 2d (3d Cir. 1970); *Cerrito* v. *Time, Inc.*, 302 F. Supp. 1071 (N. D. Cal. 1969).

Similar recognition of the necessity for summary disposition whenever possible in First Amendment cases appears in the opinion in the *United Medical* case.

In short, this case squarely presents to this Court the constitutional right to summary disposition referred to in *New York Times* and *Hill*, applied by the Circuit Courts in *Keogh, Thompson, McLaney* and *United Medical*, and followed by numerous District Courts. If summary judgment be not granted, then rights of libel-suit defendants recognized in *New York Times* and subsequent cases, designed to preserve the public interest in a free and robust press, are illusory. That is the necessary constitutional corollary to the *New York Times* doctrine.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1469

TIME, INC.,

Petitioner,

v.

JACK WASSERMAN,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals rendered on March 3, 1970, is unreported. The District Court rendered no opinion.

JURISDICTION

The judgment of the Court of Appeals was entered on March 3, 1970. The petition for a writ of certiorari was filed on April 23, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the petition herein seeking to review an interlocutory order (denial of summary judgment) is premature and inappropriate for review on certiorari.

2. Whether publication by petitioner of untrue and knowingly false statements that respondent, an attorney at law, attended a meeting bigger than Apalachin, that he was a Top Cosa Nostra hoodlum, that he had been arrested, released on $100,000.00 bail, and refused to testify before a Grand Jury, is protected by the constitutional provisions of the First Amendment. Can this be defended under the First Amendment upon the basis of editorial judgment?

3. Whether on the record presented herein issues of fact were raised requiring the denial of summary judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in part:

> "Congress shall make no law * * * abridging the freedom of speech or of the press * * *."

STATEMENT OF THE CASE

A. THE PLEADINGS

The complaint sets forth an action for libel based on the publication by petitioner in its October 7, 1966, edition of Time Magazine of an article and photograph (App. 2) pertaining to respondent, a member of the Bar of this Court. It is alleged that the article and photograph accuse

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respondent of being a "top Cosa Nostra hoodlum" who had attended a meeting in Queens, New York, "bigger than Apalachin", that he was arrested, released on bail of $100,000.00, and that he refused to testify before a Grand Jury in Queens (Par. 5-6 of Complaint, App. 2-3). By letters dated October 6, 1966, and October 17, 1966, respondent called petitioner's attention to the original Daily News photograph republished by Time, Inc., in connection with the October 7, 1966, article and to the fact that the byline on such original photograph had a caption describing respondent and another, Frank Ragano, as attorneys for the others who were accused of Cosa Nostra affiliations and who had been arrested. A retraction was requested and refused. The allegations in Time Magazine are alleged to be false and defamatory and published maliciously (Par. 7, 8, 9 and 10 of Complaint, App. 3).

The answer admits publication of the article and photograph, and the receipt of letters from respondent. It is alleged that the article is true (Third Defense, App. 6), that it was published without malice and reasonably believed to be true, that it was a fair comment, that respondent assumed the risk of identification with the group with whom he had luncheon, that respondent secured improper publicity for himself, that by representing clients in matters of public interest he became a public figure, that the article was privileged, published in good faith in reliance on responsible sources which petitioner believed, and that it was protected by the First Amendment (Fourth-Tenth Defenses, App. 6-7).

B. BACKGROUND OF CASE

On September 22, 1966, thirteen individuals of Italian origin met for luncheon in a small restaurant known as La Stella in Queens, New York. This prompted their arrest as material witnesses, the setting of bail in the sum of $100,000.00 for each at 2:00 a.m. on the following morning, and their appearance for Grand Jury testimony on a

dozen or more occasions (Def. Ex. 45-50; 97-126).[1] The District Attorney for Queens was a candidate for reelection and the occurrences noted herein and each Grand Jury appearance of the thirteen "material witnesses" produced extensive press coverage (Def. Ex. 45-50; 97-126; 131-138). The American Civil Liberties Union charged that these episodes were "a familiar burlesque performance" conducted as "a sort of running press conference" and "staged when one of the principals is running for election" (Def. Ex. 48).

Respondent, a member of the Bar of the State of New York and the District of Columbia, formally appeared as attorney for four of the so-called material witnesses, Carlos Marcello, Joseph Marcello, Frank Gagliano and Anthony Carollo. Initially, these witnesses claimed the Fifth Amendment and other constitutional safeguards before the Queens County Grand Jury. After the grant of immunity they testified and were released.

During a noon recess on the occasion of one of the Grand Jury appearances on September 30, 1966, respondent, his four clients, another "material witness", Santo Trafficante, and his attorney, Frank Ragano, had lunch at La Stella Restaurant. Members of the press followed them and photographed them as they ate. The following day a front page New York Daily News photograph, caption and story described the event as the return to La Stella Restaurant of five Cosa Nostra men, together with their two attorneys, respondent "Jack Wasserman of Washington, attorney for the Marcellos and Frank Ragano, Trafficante's lawyer". (Def. Ex. 132). The New York Post stated that five mobsters went back for dessert (Def. Ex. 131). The New York Times stated that five of the Mafia witnesses and their attorneys ate lunch at the restaurant where they were seized (Def. Ex. 133). Newsday reported that accused members of the Cosa Nostra (identifying each one) and their

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[1] References are to Defendant's Exhibits for Identification, Wasserman Deposition.

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lawyers, Jack Wasserman and Frank Ragano, lunched together in Forest Hills (Def. Ex. 135). In its October 7, 1966, issue of Time, the following week petitioner, utilizing the Daily News photograph, described the five clients, as well as their attorneys, as the Cosa Nostra hoodlums who were arrested, released on bond and who claimed the Fifth Amendment (App. 5). A request for a retraction was refused (App. 10-13). After instituting this lawsuit, the same photograph with respondent's picture was republished with the statement that it showed mobster, Carlos Marcello, and his friends (Def. Ex. 31, p. 34).

C. DEPOSITION TESTIMONY

Depositions were taken on January 17, 1967, of the researcher, writer, editor and counsel of petitioner.[2] Serena Rachels, researcher, Timothy James, writer, and George Daniels, editor, testified that they based the publication herein primarily on newspaper accounts of the event contained in the New York Times, New York Post and New York Daily News (App. 55, 64, 69, 74-75, 89, 114).[3] These newspaper accounts described respondent as the attorney for the Marcellos (Daily News, October 1, 1966), and as one of the two lawyers for the Mafia witnesses (New York Times, October 1, 1966). (Def. Ex. 131, 132, 133.)

A Daily News photograph appearing on the front page of the newspaper on October 1, 1966, described respondent as one of the attorneys for "Cosa Nostra mobsters" (Def. Ex. 132), Newsday referred to those in the photograph as alleged members of the Cosa Nostra gangs and their lawyers, Jack Wasserman and Frank Ragano (Def. Ex. 135). The Daily News photograph used in Time Magazine had the following caption:

[2]The publication was also reviewed by two top editors, Jim Keogh and Otto Fuerbringer (App. 58-59).

[3]Serena Rachels testified that she also consulted biographical files of those involved (App. 53-54).

"Clams all around. Presumably picking up where their festa was interrupted by arrest September 22, Cosa Nostra mobsters and attorneys gather at La Stella Restaurant, Forest Hills, Queens, during lunch break from Queens Criminal Court. * * * Left to right starting with man with glasses: Jack Wasserman of Washington, attorney for Marcello brothers; Carlos Marcello, Santo Trafficante of Tampa, Florida, and one-time gambling chief in pre-Castro Cuba. Attorney Frank Ragano, lawyer for Trafficante; Anthony Carollo of New Orleans, Louisiana (reputed lieutenant for Marcello brothers) Frank Gagliano of New Orleans, Louisiana (teputed lieutenant for Marcello brothers) and Joseph Marcello of New Orleans, Louisiana (back to camera). Cr. Paul De Maria, New York Daily News." (Editorial Reference file submitted by petitioner Tab 2).

Rachels, James and Daniels were aware prior to the publication that respondent and Frank Ragano were attorneys for those in the photograph (App. 66-67, 92-93, 99, 120-121). They also knew that respondent did not consent to identification of himself as a Cosa Nostra member (App. 102) and that he did not seek publicity in connection with the luncheon (App. 103). According to Rachels, respondent was not identified as an attorney because no one was identified (App. 80-82). However, she maintained that the article did not say that every person in the photograph was a Cosa Nostra hoodlum (App. 73). She believed only that some but not all were in fact members of Cosa Nostra (App. 75). James asserted that it did not seem apropos at all "to identify respondent as an attorney" (App. 99). Journalistically speaking, Daniels considered the entire group in the photograph Cosa Nostra hoodlums and intended to convey that everyone therein was a top Cosa Nostra hoodlum. For this reason respondent was not identified as an attorney (App. 121-128).

The employees of petitioner were aware that Cosa Nostra was the "underworld family" or the Mafia, a criminal organization (App. 70, 97, 101, 126), and that the Apalachin

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meeting was a great meeting of underworld figures (App. 69, 96, 126, 159-160). They asserted that the publication herein fully and accurately told the true facts (App. 75, 95, 125). John F. Dowd, counsel for Time, Inc., testified that after consultation with him the managing editor decided that no retraction would be made (App. 154).

On September 1 and 8, 1967, after the institution of this litigation, petitioner[4] began a series of articles on the "Mob", the "Brazen Empire of Organized Crime" (Def. Ex. 29 and 30). Carlos Marcello was described as "King Thug of Louisiana" (Def. Ex. 30, pp. 94-95). On September 29, 1967, the photograph of the September 30, 1966, luncheon which showed respondent as a diner, was republished in Life with the notation that Marcello and Trafficante, Cosa Nostra bosses, "returned to the restaurant with some friends for the meal shown here" (Def. Ex. 31, p. 34).

Deposition testimony was taken of respondent on December 5, 1967, and April 23, 1968, aimed, according to petitioner's counsel, at establishing that respondent was "house counsel to organized crime".[5] This deposition (App. 179-273) was devoted to the identification of a quantity of newspaper clippings relating to Carlos Marcello (Def. Ex. 1-23), Santo Trafficante (Def. Ex. 25-44) and others (Def. Ex. 32-49). The respondent testified that he had represented criminal defendants in approximately a dozen cases in the past five years (Tr. April 28, 1968, pp. 116-136), and that he was counsel for Carlos Marcello in deportation, criminal and tax matters (App. 183-184, Tr. April 23, 1968, pp. 102-115). He testified that he had appeared as attor-

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[4]Time, Inc., the petitioner, publishes Time Magazine as well as Life.

[5]On March 22, 1968, Mr. Medina, counsel for petitioner, advised District Judge Hart as follows:

> "Your Honor, I think I am entitled to show that this man (respondent) has become so that he is exclusively representing * * * he has become house counsel to organized crime. He is dependent for his livelihood upon organized crime." (Tr. March 22, 1968, p.25.)

ney for four of the individuals in the photograph involved herein (App. 240). The circumstances relating to the September 30, 1966, luncheon were the subject of testimony (App. 263-270). No evidence was developed to show any basis for the charge that respondent was house counsel for organized crime or that he was dependent for his livelihood upon organized crime.

D. MOTIONS FOR SUMMARY JUDGMENT

In their motion for summary judgment, petitioner stressed that its publication was based upon "various published reports of the La Stella luncheon" (App. 17) and that its researcher, writer, and editor "all testified to their belief in the truth of the article at the time it was published (App. 18). Upon this basis it was asserted that petitioner had First Amendment protection and immunity. Petitioner asserted that respondent was a Cosa Nostra hoodlum, that he "played the part of a Cosa Nostra leader by participating in a staged luncheon" on September 30, 1966, that he consented to the article, that it was true, that respondent could not establish malice, and that summary judgment was required to protect Time's constitutional rights. However, petitioner admitted the falsity of the charge that respondent attended the first La Stella luncheon on September 22, 1966, bigger than Apalachin, that he was arrested in connection with that luncheon, that he was released on bail of $100,000.00, and that he refused to testify before a Grand Jury, and that these facts were known to its staff at the time the article was written (App. 23, 24, 43).[6]

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[6]Under Rule 9(h) of the District of Columbia Rules of Practice, a statement of material facts as to which a party contends there is no genuine issue must accompany a motion for summary judgment and such facts, if not controverted in good faith, are admitted. Petitioner did not controvert respondent's statement of material facts in regard to the falsity of these statements and knowledge of their falsity.

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Respondent, by affidavit, categorically denied membership or affiliation in Cosa Nostra or any other criminal fraternity. He likewise denied that he consented to the article, that he ever consented to identification as a Cosa Nostra member, or that he invited the press to lunch or solicited any photographs (App. 28-29). Respondent contended that petitioner's article designated all in the photographs as Cosa Nostra hoodlums and accused all of criminal activities. The refusal to retract and the republication of the photograph in the same context after this litigation was noted as indicative of malice (App. 25-26). The reckless disregard of the truth herein was urged as a basis for the grant of interlocutory summary judgment for respondent.

E. THE DECISIONS BELOW

The District Court granted petitioner's motion for summary judgment without opinion and without reference to the contrary ruling in a companion case, *Ragano v. Time, Inc.*, 302 F. Supp. 1005 (M. D. Fla., 1969). The Court of Appeals reversed, remanding for trial "on the issues of actual malice, defamation and possible damages". The Court of Appeals ruled:

> " * * * it is undisputed that Time knew that Wasserman, like Ragano, was an attorney for one or more of the men in the group referred to in the article and was not one of those called before the grand jury and released on $100,000 bail. Time's position is that by attending the delayed lunch meeting the attorneys were playing a part and were engaging in a demonstration defiant of the law, which justified Time in its editorial decision reached in good faith[7] not to refer to appellant and Ragano as attorneys, but to place them in the same category as the others

[7]It is obvious that the Court made no finding of good faith as contended by petitioner (Brief of Petitioner, p. 19), but merely stated Time's position that its editorial decision was reached in good faith.

characterized in the article as we have set forth. Such a decision on the part of the editors of Time, however, would not preclude responsibility for any defamation known to be false or made with reckless disregard of the truth."

ARGUMENT

1. At this stage of the case an application for certiorari to review the denial of summary judgment and the remand order of the Court of Appeals is premature. Except in extraordinary situations a writ of certiorari is not issued until final decree. *American Construction Co. v. Jacksonville, T & K R Co.*, 148 U.S. 372, 384 (1892); *Hamilton-Brown Shoe Co. v. United States*, 240 U.S. 251, 257-8 (1916); *Brotherhood of Locomotive Firemen & Engineers, et al. v. Bangor & Aroostock R R Co., et al.*, 389 U.S. 327, 328 (1967). Extraordinary circumstances are not presented here to sanction review in advance of trial and full development of the facts. When *Time, Inc. v. Pape* No. 1309, Oct. Term, 1969, cert. granted April 27, 1970) presented a similar record, certiorari was denied to review a reversal of summary judgment granted to Time, 354 F.2d 558 (7th Cir., 1965, cert. denied 384 U.S. 909). Libel cases have repeatedly required final judgments before the grant of certiorari. *St. Amant V. Thompson*, 390 U.S. 727 (1968); *Beckley Newspaper Corp. v. Hanks*, 389 U.S. 81 (1967); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Time, Inc. v. Hill*, 385 U.S. 374 (1967); *Rosenblatt v. Baer*, 383 U.S. 75 (1966); *Henry v. Collins*, 380 U.S. 356 (1965); *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964); *Rosenbloom v. Metromedia, Inc.*, 415 F.2d 892 (3rd Cir., 1969), cert. granted Feb. 24, 1970 (No. 947, Oct. 1969 Term).

2. The decision below reversing the grant of summary judgment conforms to *Poller v. Columbia Broadcasting*, 368 U.S. 464 (1962); *United States v. Diebold*, 369 U.S. 654 (1962); and *Walker v. Courier-Journal*, 368 F.2d 189 (6th Cir., 1966). In a companion case herein, *Ragano v. Time,*

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Inc., 302 F.Supp. 10005 (M. D. Fla., 1969), motions for summary judgment have been denied.

As these cases decide, trial by affidavits or depositions without full examination and cross examination of witnesses under judicial supervision, are no substitute for trials by jury. Resolution of issues of petitioner's good faith in publishing the article herein and whether there was malice were fact questions placed in dispute to be resolved by a jury.

Respondent submits that absence of good faith and malice is resolved against petitioner by reason of the falsity of the publication and knowledge of such falsity. At any rate, petitioner's interpretation of the facts as to the reason why the Time employees wrote the article as they did is in dispute. Petitioner argues that the employees had an honest belief that "seven persons, including Wasserman, who participated in the second La Stella luncheon were showing their contempt for law enforcement authority by acting the part of the 13 hoodlums who had been arrested at the first La Stella luncheon" (Brief of Petitioner, p. 17). However, the writer, James, knew of no facts which would justify an opinion that respondent was contemptuous of the public or judicial process, as a result of the luncheon of September 30, 1966, at La Stella (App. 104), and Dowd had no information to contradict respondent's stated reason that he went to La Stella to inspect the premises and eat lunch (App. 153, 154).

The Court of Appeals judgment remanding the case for trial correctly applied decisions of this Court. It was consistent with the views of other circuits.

3. As the Court below recognized, the instant case is a clear and simple application of *New York Times v. Sullivan*, 376 U.S. 254 (1964). False statements deliberately made are made with malice and have no constitutional protection. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Time, Inc. v. Hill*, 385 U.S. 374 (1966); *St. Amant v. Thompson*, 390 U.S. 727 (1968); *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967); *Walker v. Courier-Journal*, 368

F.2d 189 (6th Cir., 1966); *Anti-Defamation League of Bnai Brith v. F.C.C.*, 403 F.2d 169 (D.C. Cir., 1968); *Goldwater v. Ginsburg*, 414 F.2d 324 (2nd Cir., 1969), cert. denied January 26, 1970 (No. 687, October 1969 Term).

Petitioner has sought to distinguish the instant case by categorizing it as a "deliberate omission" libel case and by assuming that the decision below rests upon the mere failure of petitioner to refer to respondent as an attorney.[8]

The failure to refer to respondent as the attorney for those in the picture resulted in the characterization of respondent in the same manner as all others in the picture. This fact is not only self-evident but was recognized by petitioner. Mr. Daniel, the editor, considered respondent as a "member of the group" and recognized that the article stated that the group were "top Cosa Nostra hoodlums" (App. 122, 124). The effect of characterizing respondent in the same manner as all others in the picture and petitioner's knowledge of the falsity of such characterization is established by the record as follows:

(a) Respondent was charged with Cosa Nostra membership, i.e. active participation "in organized crime, including interests in extortion, narcotics, prostitution, loan sharking, and every conceivable form of gambling * * * hijacking, bootlegging and murder for hire." (Item 10, Respondent's Statement of Material Facts, App. 23, not denied by petitioner. Def. Ex. 29, p. 20).

This vicious charge was and is false (Affidavit of Respondent, App. 27-30). It was known by petitioner to be false. Petitioner filed no affidavit under Rule 56(e) of the Rules of Civil Procedure to set forth any basis for the alleged truth of the charge that respondent was a member of the Cosa Nostra or for any belief in the truth of such charge. More-

[8]The case herein is distinguishable from *Time, Inc. v. Pape* (no. 1309, October Term, 1969, cert. granted April 27, 1960). In the *Pape* case there was a failure to fully describe the source of a charge of brutality. Here, there was a complete falsification of several serious charges.

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over, the source of the Time article was primarily the news accounts of the luncheon at the La Stella on September 22, and 30, 1966 (Def. Ex. 131, 132, 133, 135). None of these news accounts accused respondent of Cosa Nostra membership or any of the other charges in the article.

Falsely calling an attorney a member of the Mafia is libellous *per se*, *Santoro v. Fischback*, N. Y. Law Journal, March 31, 1968. See also: *Jaworsky v. Padfield*, 211 So. Rep. 2d 152 (La., 1968).

(b) Respondent was charged with attending a meeting "bigger than Apalachin". The Apalachin meeting is recognized among the public as a meeting of top organized criminals and was so recognized by petitioner (App. 69, 96, 126). Petitioner has admitted this statement was false and known to be false by petitioner (Items 11 and 12, Respondent's Statement of Material Facts, App. 23, 24, admitted by petitioner, App. 43). Malice is, therefore, apparent under the *New York Times* standards.

(c) Respondent was charged with an arrest. Petitioner has admitted this statement was false and known to be false by petitioner (App. 23, 24, 43). This allegation is defamatory, *Washington Post Co. v. Kelly*, 38 F.2d 151 (D.C. Cir., 1930), particularly when coupled with the allegations that he had been released upon $100,000.00 bail, which connotes an arrest for a major crime, and the false allegation that he had refused to testify before a Grand Jury.

Petitioner was fully aware as a result of its research, that the foregoing statements, hardly omissions as petitioner asserts, had reference to respondent's clients and not to him, their attorney. Its admission of falsity and knowledge of falsity defeats any defense of truth or lack of malice.

Moreover, petitioner's insistence that the entire article is truthful in the face of the facts, its refusal to retract and its republication after litigation of the photograph (Def. Ex. 31, p. 34) describing respondent as a friend of alleged Cosa Nostra boss, Carlos Marcello, all point to the fact that this was not a case of inadvertence but of deliberate and mali-

ciously false publication. *Domchick v. Greenbelt Consumers Services*, 200 Md. 36, 46-48, 87 A.2d 831 (1952); *Phelps & Hamilton, Libel* (1966); pp. 17, 261; *Prosser, Torts*, 3rd Ed. (1964), pp. 826-7; *Liquid Veneer Corp. v. Smuckler*, 90 F.2d 196, 204 (9th Cir., 1937).

4. Petitioner lays stress on the value of freedom of the press. However, the Supreme Court has consistently emphasized that this right does not permit the publication of defamations that are known to be false or in reckless disregard of the truth. The fact that dissemination of information and opinion on questions of public concern is ordinarily a legitimate, protected and indeed a cherished activity, does not mean, however, that one may in all respects carry on that activity exempt from sanctions designed to safeguard the interests of others. *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 145 (1967). None of the cases relied on by petitioner are cases in which a defamatory statement was made that was knowingly false or with reckless disregard of the truth.

The argument by petitioner that suits such as this would have a chilling effect on the press discussion of organized crime is absurd. The battle against crime does not require the reckless labelling of attorneys for defendants as "top Cosa Nostra hoodlums". On the contrary, such labelling with impunity would have a "chilling effect" on the obligation of attorneys to represent unpopular persons and the right of such persons to counsel.

CONCLUSION

The decision below is not ripe for review by this Court. It presents no conflict of circuits and conforms to the decisions of this Court. The petition should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1469

TIME, INC.,

Petitioner,

v.

JACK WASSERMAN,

Respondent.

REPLY MEMORANDUM FOR PETITIONER

As pointed out in the Petition for Certiorari, this case is one of the three pending "deliberate omission" libel cases against the petitioner Time, Inc., the other two cases being the companion case of *Ragano* v. *Time*, 302 F. Supp. 1005, and the case of *Pape* v. *Time*, 419 F.2d 980. Since the Petition was filed on April 23, 1970, this Court has granted Time's petition for certiorari in *Pape* on April 27, 1970, No. 1309 (38 L.W. 3419), and Time's appeal in the *Ragano* case is still awaiting decision by the Fifth Circuit.

In an effort to avoid the effect of the intervening grant of certiorari in *Pape*, Respondent's opposition focuses on irrelevant phrases taken out of context in an effort to suggest that a full-blown jury trial is required in this case. In so doing he not only seeks to avoid the clear import of this Court's decisions recognizing that expensive litigation, in the absence of any showing of actual

malice, has a "chilling effect" on free speech—*Time, Inc.* v. *Hill*, 385 U.S. 374, 389 (1967); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964)—but he also seeks to impose this unconstitutional burden on Petitioner at the very time when this Court has before it in *Pape* substantially the same issues presented by this case.

As set forth in detail in Appendix F to the Petition, the First Amendment guarantee of free speech requires that summary judgment be granted as soon as it becomes clear that the plaintiff cannot establish actual malice. Respondent has consistently failed to make any showing—much less a showing with "convincing clarity"—that the Time article in question was published with "knowledge that it was false" or with "serious doubts as to the truth of [the] publication." *New York Times*, 376 U.S. at 280; *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). He has admitted that the September 30 luncheon was announced in advance in such a manner that newsmen present could overhear (W. Dep., App. 264);* that he posed willingly for pictures at the restaurant (W. Dep., App. 265-67); that he talked to reporters about the stories they would write concerning the luncheon (W. Dep., App. 266-67); and that one of the members of his group paid the luncheon bill of those same reporters (W. Dep., App. 267). In addition, he has admitted that following the luncheon he expressed his appreciation to the reporters for their coverage of the incident, telling them in substance that their stories were "great." (W. Dep., App. 270) Significantly, the very news story which Respondent characterized as "great"—written by Gerald Kessler and appearing in the New York Daily News on October 1,

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* As in the Petition for Certiorari, the deposition of Wasserman is referred to as "W. Dep.", the depositions of petitioner's employees are referred to as "T. Deps.", and the appendix printed below which is included in the record certified to this Court is referred to as "App." The exhibits to the depositions are included in the original record below which has also been transmitted to this Court.

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1966 (W. Dep., App. 266-67)—was relied upon by Petitioner in preparing its article. And, that "great" news story had commented upon "the general gaiety that pervaded the restaurant"; had observed that the "move [to the restaurant] was obviously staged" and "seemed to be rehearsed"; had reported the group's taunt—"Why don't they arrest us now?"; and had expressed the view that those attending the second luncheon were "apparently making up for the food they missed when the Sept. 22 dinner party . . . was interrupted by the police." (T. Deps. ex. 2, App. 172-74).

The only substantial difference between that "great" news story and the Time article was Time's failure to identify Respondent as an attorney. That failure is all that is in dispute here. That is what Respondent complains of, and that is the peg on which the court below hung its reversal of the summary judgment for Petitioner.

Contrary to the impression Respondent seeks to convey (Opp. p. 8 and n.8, p. 12), the Time article did not in text refer anywhere to him, let alone charge that he had been arrested, released on bail, or refused to testify before a grand jury. Instead—as background to the news event being reported (*i.e.*, the luncheon of September 30, 1966)—the article merely outlined the arrest, background, and activities of the 13 Cosa Nostra hoodlums arrested on September 22, 1966. All of that led up to the main news event—the September 30 luncheon, for which the photograph spoke for itself. What Respondent in reality is complaining about is not Petitioner's article, but rather, his own lack of judgment. This was not, as Respondent's own testimony shows, a simple luncheon attended by an attorney and his clients. This was a staged performance with Respondent playing the representative role of a Cosa Nostra hoodlum.

The editorial process—involving a researcher, writer, and editor—followed by Petitioner with respect to the challenged article is set forth on pages 8-9 of the Peti-

tion, and is not disputed by Respondent. The testimony of all three Time employees responsible for the article that they believed the article was true when published (T. Deps., App. 69, 101, 125) is also not disputed by Respondent. Nor does Respondent dispute the testimony of all three that they knew he was an attorney when the article was written (T. Deps., App. 67-68, 92, 120, 141); that they saw nothing wrong with Respondent, *as an attorney*, going out to lunch with his clients (T. Deps., App. 33, 56, 75-76, 81-82, 117); that they did not believe he was acting as an attorney when he participated in the September 30 luncheon (T. Deps., App. 79, 99, 122, 146); and that they construed the September 30 luncheon to be a publicity stunt, designed to show defiance of law enforcement authorities, with all participants, *including Respondent*, representing those who attended the first luncheon. (T. Deps., App. 72-74, 79, 99, 107, 122, 127-28, 144-47)

In view of these uncontradicted facts, the present case cannot be satisfactorily distinguished from *Pape*. Both involve the deliberate omission of matter which the publisher honestly believed was irrelevant. In *Pape*, the omission concerns the absence of any reference to the fact that the stated acts of police brutality were allegations in a complaint; in *Wasserman*, the omission concerns the absence of any reference to the fact that one of the active participants in the staged luncheon happened to be an attorney. Both involve the same careful editorial process which preceded the decision to omit the challenged matter. Both involve the substitution by lower courts of their own editorial judgment and discretion for that of the publisher, solely because of the omission. Thus, both cases, in identical settings, squarely present the question whether the deliberate omission of a known fact can constitute "actual malice" in the Constitutional sense.

In the light of these circumstances, the instant Petition should be granted and assigned for argument with

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Pape. In the alternative, it is respectfully suggested that, at the least, the Petition be held pending this Court's decision in *Pape*.

Respectfully submitted,

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